



North Dakota Attorney General's LAW REPORT

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SEARCH AND SEIZURE - VEHICLE CHECKPOINT

In *Illinois v. Lidster*, ___ U.S. ___ (2004), the court held that an informational checkpoint stop was reasonable and did not violate the 4th Amendment.

One week after a hit and run accident, officers established a checkpoint designed to obtain more information about the accident from the motoring public. This checkpoint was set up in the area of the hit and run accident. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds and ask the occupants whether they had seen anything happen in that area the previous week. The officer would then hand each driver a flyer requesting assistance in identifying the vehicle and driver involved in the accident.

The defendant drove a minivan toward the checkpoint and, as he approached it, his van swerved nearly hitting one of the officers. After stopping the vehicle, the officers smelled alcohol on the defendant's breath and the defendant was later arrested for DUI.

The defendant claimed that the checkpoint stop violated the 4th Amendment. The Illinois Supreme Court concluded that Indianapolis v. Edmond, 431 U.S. 32 (2000), required it to find that the stop was unconstitutional.

In upholding the stop, the court distinguished Indianapolis v. Edmond. Edmond involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles. The Edmond checkpoint was set up primarily for general crime control purposes to detect evidence of ordinary criminal wrongdoing. Such a checkpoint being

made without individualized suspicion violated the 4th Amendment in the absence of special circumstances.

The checkpoint in this case differed significantly from the checkpoint in Edmond. This checkpoint had as its primary law enforcement purpose to ask members of the public for their help in providing information about a crime committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals. The purpose was not to determine whether a vehicle's occupants were committing a crime.

The court concluded that no presumptive rule of unconstitutionality applies to checkpoints and vehicle stops. Rather, the reasonableness of the stop is judged on the basis of the individual circumstances. The checkpoint advanced a grave public concern to a significant degree. The objective was to help find the perpetrator of a specific and known crime and not of unknown crimes of a general sort. The officers appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stop interfered only minimally with liberty of the sort the 4th Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line. Contact with the police lasted only a few seconds. Police contact consisted simply of a request for information and the distribution of a flyer. Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically and there was no allegation that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.

**CONFESSION - MIRANDA - RIGHT TO COUNSEL -
DELIBERATE ELICITATION STANDARDS OF THE 6TH AMENDMENT**

In *Fellers v. United States*, ____ U.S. ____ (2004), the court reversed the defendant's drug conviction requiring the court of appeals to address whether Fellers' 6th Amendment right to counsel was violated when questioned by officers.

Fellers was indicted for drug offenses. Officers arrested him at his home and, during the course of the arrest, Fellers made several inculpatory statements. He was not advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

After spending 15 minutes in Fellers' home, the officers transported him to a county jail and he was advised for the first time of his Miranda rights. Fellers signed a Miranda waiver form and repeated the inculpatory statements he had made earlier at his home, admitting to having associated with other individuals implicated in the charged conspiracy.

Before trial, Fellers moved to suppress the inculpatory statements made at home and at the county jail. The lower courts concluded that although Fellers did not receive his Miranda warnings at his home, his subsequent waiver of his Miranda rights at the jail permitted the admission of those jailhouse statements pursuant to Oregon v. Elstad, 470 U.S. 298 (1985), since the statements were knowingly and voluntarily made.

In reversing the lower court orders, the court distinguished the 5th Amendment custodial interrogation standard from the 6th Amendment deliberate elicitation standard. The deliberate elicitation standard, addressed in Massiah v. United States, 377 U.S. 201 (1964), provides that an accused is denied the basic protections of the 6th Amendment right to counsel when there is used against him at his trial evidence of his own incriminating words which officers deliberately

elicited from him after he had been indicted and in the absence of his counsel.

The 6th Amendment provides a right to counsel even when there is no interrogation and no 5th Amendment applicability.

The lower courts concluded that the absence of interrogation foreclosed Fellers' claim that his jailhouse statement should have been suppressed as fruits of the statements taken from him at his home. The court found that there was no question that the officers in this case deliberately elicited information from Fellers. Because the ensuing discussion took place after Fellers had been indicted, outside the presence of counsel, and in the absence of any waiver of Fellers' 6th Amendment rights, the lower courts erred in holding that the officers' actions did not violate the 6th Amendment standards established in Massiah and later cases. Because of its erroneous determination that Fellers was not questioned in violation of 6th Amendment standards, the lower courts improperly conducted its "fruits" analysis under the 5th Amendment. Those courts, in applying Elstad, held that the admissibility of the jailhouse statements turned solely on whether the statements were knowingly and voluntarily made. The question was not reached to whether the 6th Amendment requires suppression of Fellers' jailhouse statements on the ground that they were the fruits of a previous questioning conducted in violation of the 6th Amendment deliberate elicitation standard.

Since the court has not had occasion to decide whether the rationale of Elstad applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of 6th Amendment standards, the matter was remanded to the court of appeals to address the issue in the first instance.

**SEARCH AND SEIZURE - SEARCH WARRANT -
FAILURE TO DESCRIBE PROPERTY TO BE SEIZED AND WARRANT**

In *Groh v. Ramirez*, ____ U.S. ____ (2004), the court held that a search warrant was invalid for not particularly describing the things to be seized.

A Bureau of Alcohol, Tobacco and Firearms agent prepared and signed an application for a search warrant to search Ramirez's ranch. The application for the search warrant stated that the search was for specified weapons, explosives,

and records, being supported by the agent's detailed affidavits setting forth his basis for believing that such items were on the ranch, as well as a warrant form that the agent completed.

The magistrate signed the warrant form even though it did not identify any of the items that the agent intended to seize. The warrant described the Ramirez house but not the alleged weapons, and did not incorporate by reference the application's itemized list of property sought. The agent left a copy of the warrant with Ramirez after the search, but not the application. After the search, Ramirez sued the agent and others under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), claiming a 4th Amendment violation.

Although this case involved the disposition of a civil proceeding, the court reviewed the propriety of the search warrant to resolve questions regarding whether the federal officers possessed qualified immunity from suit.

The court first noted that the 4th amendment requires that the search warrant particularly describe the things to be seized. The fact that the application for the search warrant described the things to be seized did not validate the warrant. The warrant was plainly invalid. Although the warrant was supported by probable cause, and a sworn affidavit described with particularity the place to be searched, the warrant was deficient in particularity because it provided no description of the type of evidence sought by the search.

The fact that the application for the search warrant adequately described the things to be seized did not save the warrant from its facial invalidity. The 4th amendment, by its terms, requires particularity in the warrant and not just in the supporting documents. A warrant that fails to conform to the particularity requirement of the 4th Amendment is unconstitutional. The 4th Amendment requires that the warrant, not the papers presented to the judicial officer who is asked to issue the warrant, particularly describe the things to be seized.

The presence of a search warrant serves a high function and that high function is not necessarily vindicated when some other document,

somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for inspection. Although the court did not conclude that the 4th Amendment forbids a warrant from cross-referencing other documents, in this case the warrant did not incorporate other documents by reference, nor did the affidavit or the application accompany the warrant.

The court concluded that the search was not reasonable within the meaning of the 4th Amendment. The warrant did not simply omit a few items from the list of many to be seized nor did it misdescribe a few of several items. It did not make what fairly could be characterized as a mere technical mistake or typographical error. Rather, in a space set aside for description of the items to be seized, the warrant stated that the items consisted of a "single dwelling residence - blue in color." In other words, the warrant did not describe the items to be seized at all. In this respect, the warrant was so obviously deficient that the court must regard the search as "warrantless" within the meaning of its case law. The presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant. The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the 4th Amendment is unconstitutional.

It is incumbent on the officer executing a search warrant to insure the search is lawfully authorized and lawfully conducted. Because the agent did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly unreasonable under the 4th Amendment. The search was unconstitutional.

Because of this finding, the court also concluded that a cursory reading of the warrant would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal. The federal officer was entitled to neither qualified immunity for his actions nor reliance upon United States v. Leon, 468 U.S. 897 (1984) to avoid liability or to authorize the search.

RIGHT OF CONFRONTATION - TESTIMONIAL HEARSAY -
OHIO V. ROBERTS OVERRULED

In *Crawford v. Washington*, ____ U.S. ____ (2004), the court held that Crawford was denied his 6th Amendment right to be confronted with witnesses against him when the trial court permitted the state's use at trial of his wife's out-of-court statement provided to law enforcement officials after she invoked the marital privilege and refused to testify.

Crawford was charged with stabbing a man who allegedly tried to rape his wife, Sylvia. Sylvia was present during the stabbing. Crawford claimed self-defense but statements provided by Sylvia to detectives, after receipt of Miranda warnings, corroborated much of Crawford's story except with respect to whether the victim had drawn a weapon before Crawford assaulted him.

Sylvia did not testify at the trial because of a state marital privilege which generally barred a spouse from testifying without the other spouse's consent. This privilege did not extend to a spouse's out-of-court statements admissible under a hearsay exception. Noting that Sylvia had admitted she had lead her husband to the victim's apartment and had facilitated the assault, the state invoked the hearsay exception for statements against penal interest.

Crawford claimed, state law notwithstanding, that admitting his wife's statements would violate his federal constitutional right to be confronted with the witnesses against him. Although initially reversed by the Washington Court of Appeals, the Washington Supreme Court reinstated Crawford's conviction, concluding that the use of Sylvia's statement fell within Ohio v. Roberts, 448 U.S. 56 (1980), that did not bar admission of an unavailable witness's statement against a criminal defendant if the statement has adequate indicia of reliability. To meet the Roberts test, the evidence must either fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness.

In reversing the Washington Supreme Court's decision, the court conducted a lengthy historical analysis of the 6th Amendment right to confront witnesses. The principal evil at which the confrontation clause was directed was the use of ex parte examinations as evidence against the accused. The 6th Amendment must be interpreted with this focus in mind. The court

rejected the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the law of evidence. Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.

This focus also suggests that not all hearsay implicates the 6th Amendment core concerns. An offhand, overheard remark might be unreliable evidence and a good candidate for exclusion under hearsay rules but it would bear little resemblance to the abuse the confrontation law targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules but the framers of the Constitution certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused; those who "bear testimony."

Statements taken by police officers in the course of interrogations are testimonial under even a narrow standard. Even if the 6th Amendment is not solely concerned with testimonial hearsay, that is its primary object in interrogations by law enforcement officers and falls squarely within that class. The court found that the historical record also supported a second proposition that the framers of the Constitution would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross examination. The text of the 6th Amendment does not suggest any open ended exceptions from the confrontation requirement to be developed by the courts. Rather, the right to be confronted with the witness against him is most naturally read as a reference to the right of confrontation of common law, admitting only those exceptions established at the time of the founding of the Constitution. Common law conditioned admissibility of an absent witness's examination on availability and prior opportunity to cross examine. The 6th Amendment incorporates those limitations. Numerous early state decisions applying the same test confirms that these principals were

received as part of the common law in this country.

The court did not read the historical sources to say that a prior opportunity to cross examine was merely sufficient, rather than a necessary, condition for admissibility of testimonial statements. It suggests that the requirement was dispositive and not merely one of several ways to establish reliability. There is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial, for example, business records or statements in furtherance of a conspiracy. The court noted its cases had remained faithful to the framers' understanding that testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine that witness. Although the results of the court's decisions have been generally faithful to the original meaning of the Confrontation Clause, the court recognized that the same could not be said of its rationales. Roberts conditioned the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. The test departs from the historical principle identified in two respects. First, it is too broad: it applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Confrontation Clause. Second, the test is too narrow: it admits statements that do consist of ex parte testimony upon a mere finding of reliability.

The court recognized that members of the Supreme Court and academics have suggested that it revise its doctrine to reflect more accurately the original understanding of the Confrontation Clause. It offered two proposals: first, that the court apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law, thus eliminating the overbreadth referred to previously. Second, that the court impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross examine, thus eliminating the excessive narrowness. In White v. Illinois, 502 U.S. 346 (1992), the court considered the first proposal and rejected it. Although the analysis in this case

casts doubts on that holding, the court found it unnecessary to definitively resolve whether it survives this decision because Sylvia's statement was testimonial under any definition. This case does, however, squarely implicate the second proposal.

Where testimonial statements are involved, the court did not think that the framers of the constitution meant to leave the 6th Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. None of the historical authorities acknowledge any general reliability exception to the common law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. The Confrontation Clause's ultimate goal is to insure reliability of evidence. It commands not that the evidence be reliable, but that reliability be assessed in a particular manner by testing it in the crucible of cross examination. The Clause reflects a judgment, not only about the desirability of reliable evidence but about how reliability can best be determined.

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on mere judicial determination of reliability. It replaces the constitutionally prescribed method of assessing the reliability with a wholly foreign one. It is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the 6th Amendment prescribes.

The legacy of Roberts in other courts vindicates the framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous and subjective concept. There are countless factors bearing on whether a statement is reliable. Whether a statement is deemed reliable depends on heavily on which factors the judge considered and how much weight he accords each of them. Some courts attach the same significance to opposite facts.

The unpardonable vice of the Roberts test is not its unpredictability but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

The court could have resolved this case by simply reweighing the reliability factors under Roberts and finding that Sylvia's statement fell short. The court viewed this case as one of those rare cases in which the result in the lower courts is so improbable that it reveals a fundamental failure on the court's part to interpret the constitution in a way that secures its intended constraint on judicial discretion. The constitution prescribes a procedure for determining the reliability of testimony in criminal trials and the Supreme Court, and a state's court lack authority to replace it with one of their own devising. The court had no doubt that the courts below were acting in utmost good faith when they found reliability. The framers of the constitution, however, would not have been content to indulge this assumption. They knew that judges, like other government officials, could not always be trusted to safeguard the rights of the people. They were loathe to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees of open end balancing tests, the court does violence to their design.

Where nontestimonial hearsay is at issue, is wholly consistent with the framers design to afford the states flexibility in their development of

hearsay law, as does Roberts and as would an approach that exempted such statements from the Confrontation Clause scrutiny all together. However, where testimonial evidence is at issue, the 6th Amendment demands what the common law required; unavailability and a prior opportunity for cross examination.

The court did not spell out a comprehensive definition of "testimony" but, whatever else the term covers, it applies at a minimum prior testimony at preliminary hearing, before a grand jury, or at a former trial and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the state admitted Sylvia's testimonial statement against Crawford despite the fact that he had no opportunity to cross examine her. That alone is sufficient to make it a violation of the 6th Amendment. Roberts notwithstanding, the court declined to mine the record in search of indicia of reliability.

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation.

RIGHT TO COUNSEL - WAIVER - COURT ADMONITION

In *Iowa v. Tovar*, ____ U.S. ____ (2004), the court delineated the constitutional requirements for admonitions to a defendant upon an uncounseled plea of guilty.

In 1996, Tovar pled guilty to operating a vehicle under the influence of alcohol (OWI) and waiving his right to counsel. Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, the trial court explained that if Tovar pleaded not guilty he would be entitled to a speedy and public trial by jury, would have the right to be represented at the trial by an attorney who could help him select a jury, question and cross examine a state witnesses, and present evidence, if any, on his behalf, and make arguments to the judge and jury on his behalf. By pleading guilty, the court cautioned Tovar that he would give up his right to a trial of any kind on the charge against him and he would give up his right to be represented by the attorney at that trial. The court further advised Tovar that if he entered a guilty plea, he would relinquish the right to remain

silent at trial, the right to presumption of innocence, and the right to subpoena witnesses and compel their testimony. Tovar was then advised of the maximum and minimum penalties for the offense. Tovar affirmed that he understood his exposure to these penalties and agreed there was a factual basis for his plea of guilty. Later, Tovar appeared for sentencing, also without counsel, and Tovar stated he desired to represent himself.

Tovar was subsequently convicted of a second OWI at which time he was represented by counsel and pled guilty. He was later charged with a third offense and pled not guilty. Under Iowa law, third offense OWI were felonies rather than misdemeanors. His legal counsel in the third OWI offense claimed that the 1996 waiver of counsel was invalid because he was never made aware by the court of the dangers and disadvantages of self-representation to prevent its use for enhancement for subsequent offenses. The motion was denied but the Iowa Supreme Court

reversed, concluding that the court's colloquy before the 1996 guilty plea had been constitutionally inadequate concluding that the 6th Amendment required admonitions that the defendant be advised specifically that waiving counsel's assistance in deciding whether to plead guilty entails the risk that a viable defense will be overlooked and deprives the defendant of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

In reversing the Iowa Supreme Court, the court concluded that neither of these warnings are required by the 6th Amendment. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counsel regarding his plea, and of the range of allowable punishments attendant upon the plea of guilty.

Although the 6th Amendment secures to a defendant who faces incarceration the right to counsel at all critical stages of the criminal process, a person accused of a crime may choose to forego representation. While the constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to counsel to be knowing, voluntarily and intelligent.

A waiver of counsel is intelligent when the defendant knows what he is doing and his choice is made with eyes open. The court has not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election will depend on a range of case specific factors including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. Before a defendant may be allowed to proceed pro se, he must be warned specifically of the hazards ahead.

The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would apply in general in the circumstances even though the defendant may not know the specific detailed consequences of invoking it. If the defendant lacks a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the state showing that the information it provided to him satisfies the constitutional minimum. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, the Iowa Supreme Court overlooked the court's observations that the information a defendant must have to waive counsel intelligently will depend upon the particular facts and circumstances surrounding each case.

Given the particular facts and circumstances surrounding this case, it was far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In such a straight-forward case, the admonitions at issue might confuse or mislead a defendant more than they would inform him. The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded and the resources of either the state (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted. The court did note, however, that the states are free to adopt by statute, rule, or decision, any guide to the acceptance of an uncounseled plea they deemed useful. The court only held that the two admonitions the Iowa Supreme Court ordered are not required by the federal constitution.

SEARCH INCIDENT TO ARREST - SEARCH OF PASSENGER COMPARTMENT OF MOTOR VEHICLE

In *State v. Waltz*, 2003 ND 197, 672 N.W.2d 457, the court affirmed the defendant's conviction of several drug and paraphernalia possession offenses.

Officers responded to a report that a person was passed out in a vehicle at the drive up window of a Taco John's restaurant. When officers responded, they found the defendant sitting in the driver's side of his running van at the drive up

window with his window open, his checkbook in one hand and a pen the other, his head slumped down to his chest, the car in drive, and his foot on the brake. The defendant was awakened by the officer as the engine was shut off.

The defendant stated he had not been drinking but was very tired. He was asked if he had any drugs, alcohol, or anything that could be used as a weapon. The defendant stated that he had a flask in his pocket that he gave to an officer. During a pat down, the officer found two lighters and a 2-inch long silver container that looked like a pill case. The defendant failed field sobriety tests. Before the field sobriety tests were completed, officers discovered a white powdery substance inside the silver container. After the defendant's arrest, the officers searched the defendant's van and found drug paraphernalia and baggies containing a white powdery substance inside a backpack in the backseat, four metal flasks containing liquid inside an open cooler, and a lemonade container with a green leafy substance inside. Subsequent tests showed the white powdery substance in the baggies and the silver container were methamphetamine.

The defendant unsuccessfully sought to suppress evidence discovered during the searches,

claiming his arrest was improper and did not support a search incident to a lawful arrest.

The court recognized that the state has the burden of showing that a warrantless search falls within an exception to the warrant requirement. When a policeman has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile including any containers found therein. However, evidence seized incident to an invalid arrest is inadmissible if it does not fall within another exception to the exclusionary rule.

Upon a review of the facts, the court concluded that probable cause did exist to arrest the defendant. When evaluating probable cause to search, even though conduct may have an innocent explanation, probable cause is the sum total of layers of information in the synthesis of what the police have heard, what they know, and what they observed as trained officers. Probable cause does not require information that would establish guilt. In this case, the defendant was clearly impaired. His level of impairment combined with the surrounding facts and circumstances, created reasonable grounds to believe that he was under the influence of drugs or another substance.

STATE'S ATTORNEY CHARGING DISCRETION

In *Saefke v. Stenehjem*, 2003 ND 202, 673 N.W.2d 41, the court refused to issue a supervisory writ requiring a state's attorney to initiate legal proceedings.

The Burleigh County Commission made financial contributions to the Bismarck-Mandan Symphony Orchestra for July 4 celebrations on the State Capitol grounds. The Burleigh County State's Attorney concluded that the donations were not proper as being donations to a private group in violation of the North Dakota constitution. Despite this conclusion, the Burleigh County Commission made an additional donation to the symphony. After the donation was made, the Attorney General provided an opinion that donations were not authorized by state law and that the state's attorney had discretionary authority to bring an action to recover any money illegally donated against those individual county commissioners who voted for the donations.

The state's attorney did not initiate a civil action against the individual commissioners setting forth specific reasons why the action would not be commenced.

Saefke requested that the state's attorney criminally prosecute the commissioners who voted for the donations. Both the state's attorney and the Attorney General declined prosecution. Saefke commenced an action against the Attorney General and the state's attorney claiming that the state's attorney had neglected his duty and that an attorney should be appointed under N.D.C.C. § 11-16-06 to prosecute civil and criminal actions against the county commissioners who had voted for the donations. The district court dismissed the action and sought a supervisory writ from the supreme court.

In rejecting Saefke's claims, the court noted that Saefke's complaint asked the district court for declaratory judgment to overrule the formal

opinion and memorandum of the Attorney General. Saefke's claims against the Attorney General were not raised in the context of a present actual case or controversy challenging the commission's authority to make donations to the symphony. In the absence of a present actual case or controversy challenging the commission's authority to make donations to the symphony, any resolution of Saefke's claims against the Attorney General about the correctness of the Attorney General's opinion would result in an advisory opinion. Courts do not render advisory opinions.

The court also recognized the discretionary authority of a state's attorney to initiate criminal and civil proceedings. The court examined the reasons stated by the state's attorney to support his discretionary decision not to initiate the proceedings. The state's attorney's reasons for not pursuing the actions were the product of a rational mental process leading to a reasoned determination and support of his discretionary decision not to initiate proceedings against the county commissioners. Those reasons supported the district court's decision not to appoint an attorney to initiate those actions.

CRIMINAL TRESPASS - JURY INSTRUCTIONS

In *State v. Morales*, 2004 ND 10, 673 N.W.2d 250, the court affirmed the defendant's conviction of criminal trespass and simple assault of a police officer.

The defendant was a guest with several other people at an apartment of Pixie Daugherty. Officers responded to a call at the apartment and the defendant was removed from the premises. Officers informed the defendant that if he returned to the apartment he would be trespassing and subject to arrest. The defendant understood these instructions and left the premises. Later on that evening, the defendant returned to the apartment and entered through a window in Daugherty's bedroom while she slept. When officers responded to the call, the defendant threw items from the bedroom at officers, striking one of the officers with a thrown mug.

After the defendant's conviction of felony criminal trespass, he argued that the district court erred when it failed to separately instruct the issue of whether the defendant was licensed or privileged to be on the property. He claimed that he was licensed or privileged to be in the apartment because his name was on a lease and he was never lawfully evicted from the premises by the landlord in a legal action.

A defendant is entitled to a jury instruction on legal position if there is some evidence to support it. The district court is not required to instruct the jury in specific language requested by the defendant even if it is a correct statement of the law. In this case, two leases were offered as exhibits. The first lease, offered by the defendant, was dated April 26, 2001, that had signatures from himself and Daugherty but the lease was not signed by

the landlord. The second lease, dated May 1, 2001, was signed by Daugherty and Daugherty's landlord but not the defendant. The document produced by the defendant was not a binding rental contract. Other evidence demonstrated the defendant knew he did not belong on the property. The defendant had not claimed that he was licensed or privileged to enter the home on either the first or second occasions the officers were called to remove the defendant and the defendant had not lived in the apartment for at least one year. In addition, the defendant surreptitiously entered the apartment a second time through a window in Daugherty's bedroom. These actions indicate the defendant knew he was not licensed or privileged to enter the property and remain there. The defendant was not entitled to a jury instruction on the issue of license or privilege to enter the premises because he had no evidence proving he was licensed or otherwise privileged to remain on the premises.

The court also rejected the defendant's argument that the district court erred in refusing to instruct the jury on the lesser misdemeanor offense of criminal trespass that did not require the element of knowing that he was not licensed or privileged to be on the premises.

There is no constitutional right to a jury instruction on a lesser included offense. A determination that an offense is a lesser included offense does not necessarily require that a lesser included offense instruction be given upon request. It is important that instructions on lesser included offenses be given when the particular facts of the case warrant it. Instructing the jury on a lesser included offense when the evidence so warrants provides the defendant with a procedural safeguard. The

defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.

The court is reluctant to require district courts to instruct on lesser included offenses of the crimes charged regardless of the evidence presented at trial because it would lead to a less reliable jury verdict. Instructions on lesser included offenses may lead the jury to compromise, which is not compatible with the function of a jury in a criminal case.

A two-part inquiry is applied to determine whether a defendant is entitled to a jury instruction on a lesser included offense. First, the offense must be a lesser included offense of the offense charged. Second, there must be evidence which creates a reasonable doubt as to the greater offense and supports a conviction of the lesser included offense.

The state did not contest that the misdemeanor criminal trespass is a lesser included offense. However, the defendant failed to meet the second prong of the inquiry. If the defendant's evidence is to be believed, it would not require an instruction as to a lesser included offense because the evidence offered by the defendant would support a defense to the charge of criminal trespass, both the felony and the misdemeanor. Assuming the defendant's evidence creates a reasonable doubt

as to the greater offense, it would also create a reasonable doubt as to the lesser offense. If the defendant's unsigned lease was accepted as valid, there would be no trespass. The premises would not have been the property of another from which he could be excluded. Evidence which establishes a defense to both the greater and lesser offense does not support a jury instruction on a lesser include offense.

The evidence offered at trial did not support a charge under the misdemeanor offense. The defendant left the property after the first encounter with the police when he was warned that he would be trespassing if he returned. It is his reentry of the property that is the essence of his criminal trespass.

The court also rejected the defendant's claim that insufficient evidence existed to support a jury verdict that he committed assault on a police officer. The defendant threw an object at an officer and the officer was hit in the back of the neck. The officer testified he suffered bodily injury and pain as a result of the object thrown by the defendant striking him in the back of the neck. Another officer testified he saw the object strike the officer in the back of the neck and testified the officer exhibited signs that he suffered physical pain after he was struck. Viewing the testimony in the light most favorable to the verdict supports the defendant's conviction.

SEARCH AND SEIZURE - SEARCH WARRANT - INVALID NO KNOCK AUTHORIZATION - INFORMANT

In *State v. Roth*, 2004 ND 23, 674 N.W.2d 495, the court affirmed the trial court's denial of the defendant's motion to suppress evidence seized during a search of his residence pursuant to a search warrant.

A search was issued containing a no knock authorization. The executing officer knocked and announced his presence before executing the search warrant despite the no knock authorization. The trial court determined the no knock authorization was unsupported by exigent circumstances. However, the trial court applied the good faith exception to the exclusionary rule because the no knock provision was not used in executing the search warrant and thereby upheld the search.

In affirming the denial of the defendant's motion to suppress, the court concluded that probable cause did exist to support the issuance of the search warrant. Information for the search warrant was provided by an informant. The defendant claimed that the informant's tip should have been disregarded because a deputy failed to independently verify the informant's reputation for truthfulness or verify the accuracy of the informant's tip through corroboration or independent investigation.

The court has identified three types of informants with varying degrees of reliability: citizen, confidential, and anonymous. A magistrate must take into account the status of an informant in judging his credibility or reliability.

A citizen informant is someone who volunteers information, does not want anything in return for the information, and is not at risk or in fear of going to jail. Citizen informants are presumed reliable and their reliability should be evaluated from the nature of their report, their opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.

A confidential informant is known to the police officer but his or her identity is concealed from the magistrate. A named citizen informant differs significantly from the confidential informant whose identity is being protected. While a confidential informant does not enjoy the same presumed reliability as a citizen informant, he or she is still considered more reliable than an anonymous informant. The most reliable tip is one relayed personally to the officer.

An anonymous informant is one unknown to both the investigating officer and the magistrate. Within the context of anonymous informants, the informant must supply information from which one may conclude that the informant is honest and his information is reliable or from which the informant's basis of knowledge can be assessed.

In this case, if the informant was anonymous, the corroboration of the informant's information might have been required to verify the informant's reputation for truthfulness or verify the accuracy of the informant's tip through corroboration or independent investigation. However, because the informant in this case was a confidential informant, a higher degree of reliability attaches. The officer vouched for the confidential informant's reliability and veracity in his supporting affidavit. The informant's veracity and reliability were evaluated in light of his past contact with law enforcement. The deputy's affidavit set forth the basis for the belief that the informant's information was reliable by stating the informant had provided reliable information in the past that had been independently corroborated and resulted in successful state and federal prosecutions. The confidential informant had recently provided information leading to the arrest of a narcotic trafficker and had provided reliable information related to other local drug traffickers that had been independently corroborated. In addition, the confidential informant supplied detailed information regarding his knowledge of the

defendant's manufacturing of methamphetamine in his home. He described the method of manufacture and provided details of the process he observed. The informant's personal observation combined with the officer's assertion that the informant had provided reliable information in the past supports a finding of probable cause, and the magistrate had a substantial basis to conclude there was a fair probability contraband or evidence of the crime would be found in the defendant's residence.

In addition to the informant's information, information regarding the defendant's drug trafficking activity three months prior to the execution of the search warrant, the fact that he was currently facing trial on charges of possession of controlled substances and paraphernalia, the defendant's suspected involvement with other persons suspected of drug use and trafficking, the observation of the physical condition of the defendant's roommate raising a suspicion that the roommate used methamphetamine, provided, under the totality-of-the-circumstances, substantial basis for concluding probable cause existed.

The court did conclude, however, that the search warrant affidavit was insufficient to authorize the issuance of a no-knock authorization. North Dakota law requires that probable cause must be demonstrated before a no-knock search warrant may be issued. The officer's affidavit failed to provide any evidence that knocking and announcing may have placed the officers or others in danger or any exigent circumstances supporting the issuance of the no-knock provision of the search warrant. Although the no-knock provision was not supported by probable cause, the court concluded that the officer functionally excised the no-knock provision by not using it upon executing the search warrant. The court found it unnecessary to determine whether the trial court properly applied the good faith exception to the exclusionary rule. The trial court properly denied the defendant's motion to suppress evidence because the no-knock provision was not utilized when the search warrant was executed. The good faith exception to the exclusionary rule only applies under certain circumstances when a search warrant is found to be invalid. Here the search warrant was valid because the officer's actions functionally excised its invalid portion.

SEARCH AND SEIZURE - SEARCH WARRANT - CLERICAL ERROR

In *State v. Bollingberg*, 2004 ND 30, 674 N.W.2d 281, the court affirmed the defendant's convictions for deceptive writings.

An employee of the North Dakota Stockmen's Association requested a search warrant be issued to search the premises, outbuildings, vehicles, and curtilage of the defendant's home to search for books and records relating to the sale or lease of cattle. Information had been obtained prior to the issuance of the search warrant that the defendant was involved with the preparation or submission of forged documents relating to cattle sales and transactions.

The Stockmen's Association employee stated that he had been in the defendant's personal residence and had observed cattle business records in the residence on prior occasions. The search warrant was issued stating that probable cause existed to believe the property to be sought was being concealed at the outbuildings, vehicles, and curtilage of the defendant's residence but the search warrant did not mention the actual residence.

Law enforcement officers and the Stockmen's Association employee searched the defendant's house seizing several items of evidence.

On appeal, the defendant argued that the district court erred in denying his motion to suppress because the search warrant did not provide for such a search and because a good faith exception to the exclusionary rule did not apply in this case. The defendant claimed the search of his house exceeded the scope of the search warrant because the command line in the warrant did not provide for a search of his premises or the equivalent.

The 4th amendment provides protection from unreasonable searches and seizures. A search and seizure has occurred if a person has a reasonable expectation of privacy in an area searched or in materials seized. Warrantless searches inside a person's house are presumptively unreasonable. Generally, a search authorized by a search warrant is limited to the

place described in the warrant and does not include additional or different places. In this case, a search warrant was requested to search the defendant's house but the command line of the warrant did not authorize such a search. In addition, the warrant did not state there was probable cause to search the house.

The district court concluded the search warrant was not invalid and that a typographical error was likely the reason "premises" was not on the command line of the warrant. The court said it would have been reasonable for the officers to understand from the four corners of the document that something else needed to be searched. The district court explained that the second paragraph of the command portion of the warrant authorized seizure of computers and documents and that one would not likely find these things in outbuildings, vehicles, or curtilage. The district court further stated that an officer could reasonably assume, given the top portion of the search warrant and the second paragraph of the command, that the premises was implied.

A court may look to other parts of the warrant to determine whether the command portion of the warrant suffers from a clerical error. In this case, the body of the search warrant explained that the premises contained the items the authorities were to look for including documents and computer records. The search more specifically authorized the seizure of all documents and computers. There is no indication in the warrant to provide a logical reason to prohibit the search of the premises. These facts indicate a clerical error. The affidavit of the state's attorney further supported that a clerical error was made. This affidavit stated he inadvertently forgot to type in "premises" when creating the warrant. Because the omission of "premises" from the probable cause portion of the search warrant and from the command line was clearly a technical error, the court concluded that the district court did not commit error in finding the search was valid. It was unnecessary to address the good faith exception or the state's inevitable discovery and harmless error arguments.

SEARCH AND SEIZE - NO KNOCK AUTHORIZATION - GOOD FAITH EXCEPTION

In *State v. Utvick*, 2004 ND 36, ____ N.W.2d ____, the court applied the good faith exception to the exclusionary rule in reversing the trial court's order granting the defendant's motion to suppress evidence.

An officer applied for no-knock search warrant to search a hotel room registered to the defendant. In the search warrant application and supporting affidavit, the officer alleged drug use with the possibility of gun possession which jeopardized officer safety if officers were required to announce their presence before entering the room. The officer also stated that he believed contraband might be destroyed if the officers announced their presence. The officer supported his request by articulating his belief that proving ownership of contraband would also be easier if officers were not required to knock and announce their presence.

On the date the search warrant was requested, the officer and hotel employees smelled a marijuana-like odor emanating from the defendant's hotel room. The officer also listed several prior incidents involving the defendant at other hotels in Fargo, during which drug paraphernalia and a handgun clip were found.

The officer also stated when he executed a search warrant at a hotel room approximately one month before that was registered to the defendant and one other person, the defendant and five other people present when he searched the room attempted to dispose of contraband when the officer knocked and announced his presence. The search revealed a handgun and two separate amounts of methamphetamine.

The magistrate authorized the issuance of a no-knock warrant and, during the search, marijuana and drug paraphernalia was found in the hotel room.

The trial court granted the defendant's motion to suppress evidence found in the search finding that no probable cause existed for a no-knock provision of the search warrant and did not apply to the good faith exception to the exclusionary rule because probable cause was so lacking that was entirely unreasonable for law enforcement officer to reasonably believe it existed.

The court first addressed the existence of probable cause. The court reviewed the information set forth in the affidavit, specifically the prior occasions when the defendant was in, or connected to, a hotel room in which drugs, paraphernalia, or weapons were found. These incidents occurred within 2½ months before the search warrant was issued. The court concluded that the affidavit did not provide merely speculative information and conclusory statements. The affidavit contained reasonable specificity with regard to the defendant's alleged involvement in criminal activity, particularly drug use and trafficking. Even though some of the information was more than one month old, staleness is determined after reviewing the particular facts of each case, and passage of time may be unimportant to the validity of probable cause when the course of conduct is of a protracted or continuous nature. Protracted and continuous activity is inherent in drug trafficking. Drug use can also be a habituating and continuing offense. Under the totality-of-the-circumstances, the evidence presented to the magistrate established probable cause to warrant a person of reasonable caution to believe evidence of drug use and trafficking would be found in the defendant's hotel room. There was a substantial basis for the magistrate to conclude that probable cause existed to search the hotel room.

The court did, however, conclude that the evidence was insufficient to support the issuance of a no-knock search warrant. The no-knock warrant was requested based upon possible destruction of evidence and not that exigent circumstances existed based on a likelihood of danger to law enforcement.

Before the knock-and-announce requirement may be dispensed, exigent circumstances must exist to justify the unannounced entry. N.D.C.C. § 19-03.1-32 affords its citizens greater protection than the United States constitution to justify a no-knock entry. The constitution requires only reasonable suspicion be demonstrated to justify no-knock entry, but the statutory provision requires probable cause.

Probable cause determinations must be made after reviewing the facts presented in a particular case. It is no longer sufficient merely to allege drugs are present to justify issuance of a no-knock warrant. When potential destruction of evidence

is the alleged exigent circumstance, officers must provide some particularized basis for their suspicion. A particularized basis is not demonstrated when officers fail to demonstrate the suspect's ability to destroy the evidence.

The search warrant in this case was issued for the defendant's hotel room. The layout of a hotel room may have made it particularly easy for a suspect to destroy evidence given the probable location of the bathroom. However, such circumstances were not shown in this case. There was no indication that the officer alleged the location of the drugs in the hotel room contributed to easy disposal creating an exigent circumstance. The bathroom may have been readily accessible but the court could not make such an assumption if the information was not in the supporting affidavit. Because the officer did not present this information to the magistrate, the magistrate could not have relied on it when making the probable cause determination for the no-knock authorization.

The officer also failed to present any allegation stating the drugs sought were of a type considered easily disposable. Merely alleging the presence of marijuana and methamphetamine does not allow one to infer drugs were easily disposable. No particularized facts whatsoever were presented regarding the fact that the drugs were easily disposable. While it could be true that methamphetamine and marijuana are easily disposable, it could also be true that the drugs were of such an amount or in such a location to make them difficult to dispose of quickly. Large quantities of drugs or unprocessed marijuana may not be conducive to simply pitching aside or flushing, which the officer stated could occur if the no-knock authorization was not given. The magistrate was not presented with any information stating the drugs were of such a nature making them easily disposable or easily pitched aside. The magistrate could not have relied on such information when making the probable cause determination.

Although the officer had prior experience that the defendant was a registered guest of a hotel room and in the company of persons suspected of disposing of evidence in prior searches, the officer's reasonable belief that the defendant might destroy the drug evidence if he knocked and announced his presence did not constitute exigent circumstances in light of the officer's failure to allege the drugs were of a type or in

such a location making disposal easy. Merely demonstrating a predisposition to destroy evidence, based on prior instance, without more, cannot be said to be particularized information warranting no-knock authorization.

Under the totality-of-the-circumstances the allegations set forth in the officer's affidavit were insufficient to create an exigent circumstance justifying issuance of the no-knock justification. The supporting affidavit did not contain information regarding the defendant's ability to destroy evidence nor was there any information regarding the ease with which any evidence may have been destroyed. There was no particularized information supporting the officer's belief evidence would be destroyed if law enforcement was required to knock. There was no substantial basis for the magistrate's conclusion that probable cause existed for the no-knock authorization and such authorization was issued in violation of the statutory provision.

The North Dakota Legislative Assembly has not set forth a remedy when enacting N.D.C.C. § 19-03.1-32. In prior cases, the court had held the statute implicated substantive constitutional rights, particularly the right to be free from unreasonable searches and seizures under the 4th Amendment. Because a violation of the statute is tantamount to a violation of the 4th Amendment, the court would apply the federal exclusionary rule to violations under N.D.C.C. § 19-03.1-32.

Although the good faith exception had previously been applied when a search warrant was issued on a per se issue in violation of the statutory provision, the good faith exception must be considered regardless of whether the search warrant was issued under such conditions. Any violation of the statute implicated substantive constitutional rights under both the 4th Amendment to the United States Constitution and Article I, § 8, of the North Dakota Constitution.

Since a state constitutional argument was not properly raised and briefed, federal precedent controlled and the good faith exception should apply in this case.

Trial courts are not precluded from applying the good faith exception to search warrants issued on a per se basis. The trial court concluded the no-knock provision of the search warrant was issued on a per se basis. However, the record in

the trial court's findings of fact did not support the trial court's legal conclusion that the magistrate issued the no-knock provision of the search warrant on the per se basis in violation of state and federal law. The officer did more than merely allege drugs were present to justify the issuance of a no-knock warrant. The officer presented some particularized information to the magistrate regarding the defendant's prior flushing history in addition to his belief drugs would be found in the hotel room. While this information did not give rise to existence of probable cause for issuance of the no-knock warrant, it is sufficiently particularized to rebut any legal conclusion that the warrant was issued on a per se basis.

The sum total of information provided in the officer's affidavit was not so lacking in indicia of probable cause that the officer could not have reasonably relied on the issuing magistrate's determination. The officer's reliance on the warrant issued by a neutral and detached magistrate, was not so egregious that it could be deemed entirely unreasonable. The objective of the exceptions to the good faith exception is to deter police misconduct. That objective will not be served by excluding the illegally obtained evidence in this case.

RIGHT TO COUNSEL - SELF REPRESENTATION - INFORMANT

In *State v. Ochoa*, 2004 ND 43, 675 N.W.2d 161, the court affirmed the defendant's convictions of possession of drug paraphernalia and of a controlled substance with intent to deliver.

A paid confidential informant provided information to a deputy that the defendant and the informant were renting a vehicle in Fargo and traveling to California to buy methamphetamine. During the trip, the informant continuously contacted the deputy reporting that the defendant had picked up methamphetamine and placed in the trunk of the rental car and providing the deputy with information regarding the party's whereabouts during their return to North Dakota. The informant provided the license plate number, make of vehicle, and the place of rental, all information that was verified by the deputy.

A search warrant was obtained to stop and search the vehicle when it returned to North Dakota. The informant was driving the vehicle when stopped and the defendant and third person were passengers. A search of the vehicle uncovered a syringe and methamphetamine in the defendant's shoes. The defendant applied for court appointed counsel but, despite such representation, the defendant continuously filed various motions with the court. In a period of six months, the trial court issued four appointments of counsel to represent the defendant. The defendant's final appointed counsel moved for clarification of her role as the defendant's attorney, stating that the defendant wanted to represent himself in various portions of the trial but would need an attorney to act as "standby counsel." Although the term "standby counsel" was used, it was clear from the motion

that a form of hybrid counsel, co-counsel, was being requested. The trial court denied the motion stating the relationship between the lawyer and the defendant was the same as any other relationship between the counsel and the defendant. A request was again made a day before the trial that the defendant be allowed to represent himself during various portions of the trial, and this request was denied.

The court first rejected the defendant's claim that the trial court committed error when issuing the search warrant. The court concluded that probable cause existed for the search of the vehicle. The informant was classified as a confidential informant, which generally is defined as an informant known to the police officer but his or her identity is concealed from the magistrate. While confidential informants do not hold the highest degree of presumed reliability, confidential informants do enjoy more reliability than anonymous informants. Anonymous informants must supply information that allows one to deduce the information as reliable and independent investigation may be required when the informant does not supply the information necessary to evaluate the tip. However, corroboration is not always necessary when a confidential informant is involved.

In this case, the informant's reliability was sufficiently demonstrated by the facts. Her receipt of \$300 for her services and the fact that the defendant alleged that she was a known drug user did not necessarily detract from her reliability in this case. The informant's reliability was demonstrated by the fact that she provided the

deputy with highly specific, detailed information relating to the defendant's drug activity, including detailed information regarding locations while traveling, the quantity of methamphetamine the defendant purchased, and the specific and unusual location of the methamphetamine in the defendant's shoes. The informant's level of specificity in describing the drug activity taking place makes it more likely the information provided was accurate. In addition, the informant's reliability was further bolstered by the information the deputy was able to independently verify. Under the totality-of-the-circumstances, the verified information and the detailed information established probable cause to search the vehicle by establishing that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place.

The defendant also claimed the trial court committed error in denying his right to self representation. According to the defendant he made it abundantly clear, through many filings with the trial court, he wanted to participate in his own trial and the trial court failed to make an inquiry into the defendant's desire to represent himself.

Claims of a violation of a constitutional right are reviewed de novo. The court will require reversal of a conviction if a defendant's constitutional right to counsel is violated because prejudice is presumed. A defendant has a constitutional right to self representation under the 6th Amendment to the United States constitution. He also has a right to counsel under the 6th Amendment and Article I, § 12 of the North Dakota Constitution. These rights are mutually exclusive.

A waiver of a constitutional right is only effective if done clearly and intentionally. Whether there has been an intelligent waiver of constitutional rights depends upon the facts and circumstances of each particular case including the background, the experience, and the conduct of the accused.

The court will not always require an unequivocal statement as a waiver of counsel. A defendant's conduct may be the functional equivalent of a voluntary waiver of a right to counsel. However, determining whether the defendant's conduct was the functional equivalent of voluntary waiver of counsel is inappropriate in this case. The court generally will apply the concept of a functional waiver when the trial court has determined a

defendant's behavior is tantamount to a voluntary waiver of a right to counsel and subsequently removes counsel or appoints counsel in a standby capacity. Here the trial court made no such finding and the defendant's conduct is not in question. Rather, the court was concerned with the defendant's statements related to his right to counsel, right to self representation, and request for hybrid counsel.

A defendant will prevail if, through his statements, he clearly and intentionally or, in other words, unequivocally, waived his right to counsel and invoked his right to self representation. Any ambiguity will be resolved against a conclusion that the defendant waived his constitutional right to counsel and invoked his constitutional right to self-representation. A court may not infer waiver of constitutional rights.

The defendant invoked his right to counsel but attempted to file pro se motions which the court disregarded. The only time the defendant may have attempted to waive counsel and invoke his right to self-representation was after his last attorney was appointed. However, that alleged waiver of defendant's right to counsel, an invocation of his right to self-representation, is also equivocal.

The defendant's assertions included a request for an appointment of a new attorney or self-representation during a portion of the trial as an alternative to a continuance, requested due to a conflict with his trial attorney's schedule. The court noted that if it agreed with the defendant that he asserted his right to self-representation, it must also conclude the defendant simultaneously asserted his right to counsel. These two assertions are inconsistent and do not support his position. Assertion of one right requires waiver of the other.

After reviewing the record, the court concluded that the defendant's requested participation in the trial was actually a request for hybrid representation or the ability to participate as co-counsel with his attorney. This far exceeds the role of standby counsel that the defendant reportedly claimed to request. A trial judge is not required to order hybrid representation. Nor does a defendant have a constitutional right to choreograph special appearance by counsel. After reviewing the entire record, the court concluded that the defendant did not unequivocally waive his right to counsel nor did he

unequivocally invoke his right to self-representation. The trial court did not commit error when it order the defendant to proceed to

trial with representation and there were no constitutional violations of his right to self-representation.

WITNESSES - TELEPHONE TESTIMONY - CONTINUANCE

In *State v. Lemons*, 2004 ND 44, 675 N.W.2d 148, the court affirmed the defendant's conviction of aggravated assault.

Prior to his trial, the defendant tried to subpoena a juvenile as a defense witness. The juvenile was no longer in North Dakota and the defendant did not become aware of the juvenile's absence until the second day of trial. Upon learning of the juvenile's absence, the defendant requested that the witness be allowed to testify by telephone from an out-of-state location. The trial court denied the request. The defendant then moved for a continuance to allow him time to procure the witness. The continuance request was denied.

The court found no error by the trial court's refusal to allow testimony by telephone. North Dakota Rule of Criminal Procedure 26 requires that testimony of witnesses would be taken orally in open court unless otherwise provided by statute or rule. North Dakota case law did not address whether telephonic testimony may be admitted in the criminal trial. A civil rule equivalent, North Dakota Rule of Civil Procedure 43, requires testimony be taken orally in open court but allows for deviation from this requirement under certain circumstances if all parties agree. Because there is no precedent for such a practice in criminal trials, and the testimony appears to possibly violate Rule 26, the trial court did not act arbitrarily, unreasonably, or capriciously in denying the defendant's request to allow the juvenile to testify by telephone. Even if the extended provisions of the civil rule were deemed applicable in this case, there was no agreement between the parties because the state objected.

A trial court has a great latitude and discretion in conducting a trial. A motion for a continuance rests in the discretion of the trial court and this discretion will not be set aside on appeal absent an abuse of discretion. A trial court has broad discretion in determining evidentiary matters and abuses its discretion only when it acts in an arbitrary, unreasonable or capricious manner or misinterprets or misapplies the law.

After the denial of the motion for a continuance to obtain the presence of the out-of-state witness, the defendant's counsel failed to make an offer of proof as to the substance of the juvenile's testimony. This issue was not preserved for appeal due to the defendant's failure to make an offer of proof regarding that testimony. Error cannot be predicated upon a ruling which excludes evidence unless the party offering the evidence makes an offer of proof or the substance of the evidence is apparent from the context in which the questions were asked. The substance of the evidence is not demonstrated when the defendant's counsel stated only that the witness would provide credible exculpatory evidence. The court also determined that no obvious error was committed by the denial of the motion for continuance. The court could not presume that exclusion of the testimony would have affected the outcome or was prejudicial to the defendant. The defendant did not meet his burden in demonstrating denial of a continuance affected his substantial rights and the trial court's denial was not obvious error.

SPEEDY TRIAL

In *State v. Bergstrom*, 2004 ND 48, ____ N.W.2d ____, the court affirmed the defendant's conviction of possession of drug paraphernalia.

In September of 2001, the defendant was charged with various drug and firearm offenses. Prior to trial, three of the charges were dismissed.

The trial court delayed the trial date twice. The state requested the first continuance because the assistant state's attorney assigned to the case had a scheduled vacation during the dates set for trial. The state requested a second continuance because its main witness was at the FBI Training Academy and the crime lab analyst was subpoenaed for another trial during the dates set

for trial. A third motion for continuance by the state was denied.

On January 8, 2003, approximately 400 days after pretrial motions were due. The defendant moved to suppress evidence obtained in the searches. The trial court denied the defendant's motion to suppress. On May 27, 2003, the defendant moved to dismiss the case for lack of a speedy trial, arguing it was unconscionable that more than two years had elapsed since he was arrested. The motion was denied and trial was held beginning on June 5, 2003.

A four-factor balancing test is used to evaluate the validity of a speedy trial claim. The test requires balancing four factors, length of delay, reason for the delay, proper assertion of the right, and actual prejudice to the accused. These are related factors and must be considered together with other such circumstances as may be relevant.

The delay of over 2 years in this case weighs in favor of the defendant. The length of delay should never be the norm and trial judges should be diligent in preventing the length of delay in cases such as this. However, the length of delay does not control the analysis but is merely one of the four factors for the court to balance.

Closely related to the length of delay is the reason for delay. The defendant argues the reason for the delay is mostly attributable to the state but admits in this brief on appeal that his changes in counsel could excuse some of the delay.

It is relevant whether the state purposefully delayed the trial. There is no evidence the state purposefully delayed the trial. The court rescheduled the trial twice. The delay due to the assistant state's attorney's vacation is attributable to the state action but the delay to the unavailability to the state's main witness and crime lab analyst would not be. In addition, the defendant moved to suppress evidence obtained in the searches leading to his arrest approximately 400 days after pretrial motions were due, causing delay. In his brief on appeal, the defendant addresses only the first two factors of the balancing test. He fails to address whether he properly asserted his right to a speedy trial and failed to allege any prejudice to him due to delay. Although the court was concerned by the length of the delay in this case, the defendant failed to bring up his "heavy artillery" and had not satisfied the court that speedy trial rights were violated by the delay in bringing his case to trial.

THEFT - SUFFICIENCY OF EVIDENCE - JURY INSTRUCTIONS

In *State v. Wilson*, 2004 ND 51, ____ N.W.2d ____, the court affirmed the defendant's conviction of the theft. The defendant sold meat products door-to-door.

A Mandan resident, who was diagnosed with Alzheimer's Disease, type dementia, in November 2000, purchased meat products from the defendant between January 11 and January 17, 2001, giving the defendant four checks in the amounts of \$650.00, \$1,014.42, \$1,600.00 and \$3,000.00. Over 1000 pieces of meat had been delivered to the resident's home and she had to store some of them in her garage and on her back porch. The defendant was charged with theft by deception. At trial, a police officer testified that the defendant had informed him the \$3,000 check was a personal loan and that the resident wanted to use some of the other meat products as gifts. The defendant admitted spending an hour and half with the resident. The woman's son testified that this was an adequate amount of time to

detect the victim's memory problems. The victim testified she did not know or recognize the defendant but that she did sign the checks. She also testified that she did not know why she would have bought so much meat and that she did not lend money to the defendant.

The defendant twice requested the trial court provide a jury instruction defining "deception." These requests were denied by the court, stating the term was a matter of common use and instruction would unnecessarily confuse the jury.

The defendant claimed insufficient evidence existed to sustain a conviction for theft by deception. He claims the evidence showed a series of contracts between the victim and himself that were not fraudulent in nature or their terms. The victim received a copy of the contract and there was no evidence showing the personal loan would not have been repaid.

Disagreeing with this claim, the court noted that it will review the evidence most favorable to the verdict and all reasonable inferences from such evidence when reviewing challenges to the sufficiency of the evidence. The defendant must show the evidence, when viewed in light most favorable to the verdict reveals no reasonable inference of guilty. The court will not weigh conflicting evidence or judge the credibility of witnesses. The court reverses a conviction only if no rational factor could have found the defendant guilty beyond a reasonable doubt.

The facts, viewed in the light more favorable to the verdict, supported the defendant's conviction. The defendant visited the victim four times over a week long period, obtaining more money from the victim with each visit. The jury heard testimony from the victim's son and her doctor describing the victim's Alzheimer's and the effect it had on her mental abilities. The jury also had an opportunity to observe the victim personally while she testified. The evidence related to the checks supports the defendant's conviction. While each check bore the victim's signature, only one check, for \$650, was written entirely in the victim's handwriting. The defendant claimed the fourth check, in the amount of \$3,000 was a loan but the victim's son testified that the defendant informed him it was for an additional 20 cases of meat. The defendant told a different story to law enforcement stating the check was a loan from the victim. Based upon the facts viewed in the light most favorable to the verdict and on the inferences to be drawn, the jury reasonably could have found the defendant guilty beyond a reasonable doubt.

The defendant's requested jury instruction regarding deception was not a complete statement of the law. The requested instruction omitted significant portions of the definition found in N.D.C.C. §12.1-23-10(2). The court properly refused the defendant's requested jury instruction, since a court must refuse a requested instruction that misstated the applicable law.

The court must consider, however, as a whole, whether the jury instructions adequately and correctly inform the jury of the applicable law. The trial court has a duty to correctly instruct the jury on the applicable law. Even though the trial court had no duty to provide the defendant's specific proposed instruction, a complete instruction defining "deception" may have been necessary to adequately and correctly inform the jury of the applicable law. The defendant argued that the trial court was required to provide a definition for "deception" because the term is not a matter of common usage as related to this case. The court disagreed. The trial court found the word had a common meaning and the instruction might only serve to unnecessarily confuse the jury. Frequently, to attempt to explain understandable language is merely to confuse. The term "deception" as it applies to this case, is a term of common understanding easily understood by the jury. The trial court did err in failing to provide the jury with a definition of "deception." The instructions, as a whole, adequately and correctly informed the jury of the law even though they did not include a definition of "deception."

NEW HIDTA PROSECUTOR

Paul Emerson has assumed the HIDTA prosecutor position formally held by David Hagler. Paul can be found at the office of the United States Attorney, in Bismarck.

This report is intended for the use and information of law enforcement officials and is not to be considered an official opinion of the Attorney General unless expressly so designated. Copies of opinions issued by the Attorney General since 1993 are available on our website, www.ag.state.nd.us, or can be furnished upon request.